

In re Applicant:

Baruch Segal

Serial No.: 10/725,005

Filed: Dec. 2, 2003

For: Dieting System And Method
Based On Controlled
Carbohydrate Intake

Examiner: Stulii, Vera

Commissioner for Patent
PO Box 1450
Alexandria, Virginia 22313-1450
Attn: Patent Appeals Center

[illegible]

Confirmation No.: 3160

Group Art Unit: 1794

Attorney
Docket: 3116/1

RESPONSE TO NOTIFICATION OF NON-COMPLIANT AMENDMENT

Sir:

This is in response to the Notice of Non-Compliant Amendment mailed October 20, 2009, which response is being made on or before November 20, 2009, and for which no late fees are due.

Attached hereto is Replacement Appeal Brief, correcting the Statement of the status of the claims (page 3), replacing the Appeal Brief filed Sep. 24, 2009.

Respectfully submitted,

Mark/M. Friedman
Attorney for Appellant
Registration No. 33,883

Date: November 16, 2009

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Applicant:	§	
	§	Confirmation No.: 3160
Baruch Segal	§	
	§	
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Based On Controlled	§	Docket: 3116/1
Carbohydrate Intake	§	
	§	
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Commissioner for Patents
PO Box 1450
Alexandria, Virginia 22313-1450

ATTENTION: Board of Patent Appeals and Interferences

APPELLANT'S BRIEF

Madam/Sir:

This is in furtherance of the Notice of Appeal filed in this case on August 2, 2009. The fees required under § 1.17(c) and any required petition for extension of time for filing this brief and fees therefor are dealt with in the accompanying TRANSMITTAL OF APPEAL BRIEF.

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I. REAL PARTY IN INTEREST

The real party of interest in this application is the inventor, Baruch Segal.

II. RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences.

III. STATUS OF CLAIMS

The claims under appeal are claims 1-9 and 18-23.

The status of the claims in this application is as follows:

- Claims 1-9 and 18-23 are rejected, and claims 10-17 are cancelled.

IV. STATUS OF AMENDMENTS

No amendment was submitted subsequent to the Final Rejection of June 11, 2009.

V. SUMMARY OF CLAIMED SUBJECT MATTER

The invention defined by independent **claim 1** under appeal is a system for reducing human body weight as described primarily on page 4, lines 13-28 with reference to FIG. 1 and on page 5, line 29 to page 6, line 11 with reference to FIGS. 2a and 2b. The system includes (a) a portable kit **100** (FIG. 1) or **200** (FIGS. 2a and 2b) having a plurality of foods organized spatially in *groups ("levels")*. *Each level (group) includes foods of substantially similar carbohydrate content.* The carbohydrate content of the foods varies from level to level. The largest group (a bottom level **106** in FIG. 1 or **206** in FIG. 2a) includes foods of essentially zero carbohydrate content (carbohydrate-free). The next, second largest group (a middle level **108** in FIG. 1) includes foods of somewhat higher, limited carbohydrate content. The third largest group (top level **110** in FIG. 1 or top level **208** in FIG. 2) includes one food having a highest, carbohydrate-rich content. The system also includes (b) spoiling prevention means (e.g. cooling packs **116'**, **116''**, **116'''**) for keeping the foods from spoiling. *The number of foods in each level is chosen as to provide a predetermined total carbohydrate content matching an optimal daily allowed content.*

The invention defined in dependent **claim 2** is similar to that of claim 1 described above but further requires that the foods be contained in separate containers as detailed on page 4, line 32.

The invention defined by **claim 3** is similar to that of claim 2 described above but further requires that the levels (groups of foods of essentially similar carbohydrate content) vary from a bottom level with N containers of substantially carbohydrate free foods to a top level with M containers of high carbohydrate content foods, and wherein $M < N$, as detailed on page 5, lines 5-12.

The invention defined by dependent **claim 4** is similar to that of claim 3 described above, but further requires that the levels include three levels, a bottom level with four said containers, a middle level with three containers, and a top level with one container as detailed on page 4, line 33 to page 5, line 4

The invention defined by dependent **claim 5** is similar to that of claim 4 described above, but further requires that the spoiling prevention means include cooling packs **116'**, **116''** and **116'''** as detailed on page 5, lines 13-23.

The invention defined by dependent **claim 6** is similar to that of claim 5 described above, but further requires that the cooling packs be arranged in accordance with the levels to provide cooling to each container. That is, the cooling packs are disposed between or near the containers, as described on page 5, lines 19-20, and page 6, lines 9-11.

The invention defined by dependent **claim 7** is similar to that of claim 6 described above, but further requires that each level be color-coded, as described on page 5, lines 16-20.

The invention defined by dependent **claim 8** is similar to that of claim 7 described above, but further requires that the color-coding be provided by the cooling packs being colored with a different color for each level, as described on page 5, lines 20-28.

The invention defined by dependent **claim 9** is similar to that of claim 7 described above, but further requires that the color coding include red for the top level, yellow for the middle level and green for the bottom level, as described on page 5, lines 20-28.

The invention defined by independent **claim 18** under appeal is a portable dieting apparatus comprising as described primarily on page 5, line 29 to page 6, line 11 with reference to FIGS. 2a and 2b, but also with reference to FIG. 1 on page 4, line 13 to page 4, line 28. The portable dieting apparatus includes an *asymmetrically shaped kit 200* that includes (a) a plurality of food storage units (compartments **204**) and (b) *a plurality of foods having a known total carbohydrate content* stored in the compartments *by levels* (e.g. **206** and **208**) according to *a carbohydrate content order*, wherein *each level includes foods of substantially similar carbohydrate content* and wherein *the substantially similar carbohydrate content varies from level to level*, whereby the apparatus provides a *predetermined daily carbohydrate intake* that leads to permanent weight loss.

The invention defined by dependent **claim 19** is similar to that of claim 18 described above, but further requires that each storage unit be a separate container as described with reference to FIG. 1 on page 4, line 32.

The invention defined by dependent **claim 20** is similar to that of claim 18 described above, but further requires that the storage units include separate compartments in a one-piece enclosure as described on page 5, line 29 to line 31.

The invention defined by dependent **claim 21** is similar to that of claim 19 described above, but further requires that the portable dieting apparatus include spoiling prevention means to keep said foods from spoiling, as described on page 6, lines 8-11.

The invention defined by dependent **claim 22** is similar to that of claim 21 described above, but further requires that the portable dieting apparatus include color-coding means for marking the carbohydrate content order, as described on page 6, lines 7-8.

The invention defined by dependent **claim 23** is similar to that of claim 18 described above, but further requires that the asymmetric shape include a substantially pyramid shape with a wide bottom and a narrow top (page 4, lines 22-25) and that the plurality of foods stored in said storage units according to a carbohydrate content order include carbohydrate-free foods stored in storage units near the bottom and at least one carbohydrate rich food stored in at least one storage unit near the top (page 4, lines 24-32).

VI. GROUND OF REJECTION TO BE REVIEWED ON APPEAL

The grounds of rejection to be reviewed on appeal are as follows:

Whether claims 1-9 and 18-23 are unpatentable under 35 U.S.C. 103(a) as obvious over Gordon (US 2003/0219513) in view of Mackay. (UK 2,119,633), Matson (US 2006/0160050) and Riling et al (US 5,582,028).

VII. ARGUMENTS

In the arguments presented below, various claims will be grouped together for clarity and conciseness of presentation of the issues before the Board of Patent Appeals and Interferences. To the extent that such grouping is interpreted by the Board as a waiver of separate consideration for the grouped claims, it should be noted that any such waiver is effective only for the purpose of simplifying the issues and/or reducing attorney costs in the present appeal proceedings, and does not constitute any admission beyond that scope. Furthermore, any such waiver is effective only in relation to the rejections of record. The Appellant reserves the right to withdraw any such waiver in the event that any new ground for rejection is introduced during the appeal procedure.

A. Grounds of Rejection I – 35 U.S.C. 103(a) over Gordon (US 2003/0219513) in view of Mackay. (UK 2,119,633), Matson (US 2006/0160050) and Riling et al (US 5,582,028).

1. **General**

The Appellant notes that there were two Non-final Rejections in the RCE, in Office Actions dated 08/09/2008 and 01/27/2009. Both (as well as the Final Rejection of 06/11/2009) dealt with the same set of claims, but the grounds for rejection changed from the first to the second. In the OA of 08/09/2008, claims 18-20 and 23 were rejected as being unpatentable over Gordon alone and claims 1-9, 21 and 22 were rejected for being unpatentable over Gordon in view of Riling et al. In the OA of 01/27/09, all claims (1-9 and 18-23) were rejected for being unpatentable over Gordon in view of Mackay, Matson and Riling et al.

2. **Claims 1 and 18**

Gordon discloses a method and system for monitoring or controlling and recording a nutritional intake of a subject comprising providing a plurality of different types of foods packaged to contain a predetermined and substantially uniform content of at least one nutritional component; and monitoring or controlling the number of

food packages consumed during a predetermined time period. Gordon discloses a spatial organization of foods of the same uniform content on two different shelves (FIG. 5b). Gordon's invention relates to (and only to) foods (or "food units") having the same nutritional content, no matter what their arrangement is. The Examiner agrees that Gordon does not teach "levels" in the sense of the present invention, i.e. groups of foods of substantially similar carbohydrate content wherein the carbohydrate content of the foods varies from group to group (level to level).

Mackay teaches a compartmented plate divided into different regions which are marked in a different manner e.g. by color coding to indicate the dietary characteristics of different types of food intended to be placed in each region. Mackay's plate has a two-dimensional spatial arrangement of different nutritional components. The Examiner's position is that Mackay discloses restricting carbohydrate intake by providing a food kit with defined carbohydrate content as well as a feature of variable carbohydrate content from one compartment to another which are marked in a different manner, e.g. by color coding, to indicate different levels of carbohydrate content.

Matson discloses a system and method that utilizes a set of graduated fixed volume containers (or "trays"), that are graduated to provide a user means to control the volume of food consumed over time. The set of containers preferably includes a smaller number of large fixed volume containers, for example three, and a larger number of small fixed volume container, for example six (paragraph [0007]). The containers are volumetrically graduated to measure fixed volumes of food or foods that are consumed by a person each meal, viz one container for each meal (paragraph [0020]). Figures 3A and 3b, their descriptions in paragraphs [0026]-[0029] and Table 2 and its description clarify that each container or tray includes different foods groups (e.g. simple carbohydrates, proteins and complex carbohydrates). The instant invention provides a user friendly system and method for controlling nutritional intake through volumetric and frequency control using a set of containers having fixed volumes that are used to measure food according to a schedule (paragraph [0025]).

During the course of the prosecution, the Examiner repeatedly misstated the meaning of "levels". Her position is that Matson's teaching of organizing foods in a vertical arrangement with different values of controlled variable (in this case of

volume) is equivalent to the recitation of the "levels" in claims 1 and 18. Appellant submits that this position is erroneous from at least these aspects:

Matson teaches a diet based on total volume consumed per day, not on a total, predetermined, single (carbohydrate) nutritional content consumed per day. Matson's disclosure of organizing foods in vertical arrangement with different values of a controlled volume variable is not a teaching of "levels" of the present invention. Matson does not teach a container or tray having compartments which include foods of substantially similar carbohydrate content ("level"). Instead, he teaches a container or tray that has different simple carbohydrate and complex carbohydrate contents (see his paragraphs [0026-0029], the dimensions of subdivided tray sections in Table 2 and the type of foods in each section). The spatial arrangement shown in his FIG. 3C does not show "levels" of the present invention, but a stack of containers 300, 310, 320, etc. with respective lids 301, 311, 321, etc., each container having different types of foods with different nutritional contents. In order to match, or be the equivalent of, the definition of "level" of the present invention, each of Matson's containers in FIG. 3C should have included only foods of substantially similar carbohydrate content, and this substantially similar carbohydrate content should have varied from container 300 & 301 to container 310 & 311 to container 320 & 321, etc. This most emphatically is not taught anywhere in Matson.

The Examiner misunderstood Appellant's argument re. Matson in the Response of 02/19/2009. The Appellant's arguments are not against the individual reference but against the position that the key limitation of "levels" recited in claims 1 and 18 is disclosed in Matson. If Matson does not teach "levels", and levels are not taught in any of the three other references, then the Examiner has failed to state a case of *prima facie* obviousness. Moreover, the Appellant's argument that Matson teaches away from the present invention is not an argument that shows non-obviousness by attacking references individually, but an argument showing lack of motivation or suggestion to combine the references. The combination of Gordon (foods with the same nutritional content, regardless of spatial arrangement), Mackay (single plate with a two-dimensional spatial arrangement of different nutritional components) and Matson (compartmentalized containers with different values of a controlled volume variable arranged vertically) which supposedly discloses all the limitations of claim 18 and element (a) of claim 1 is not suggested in any of these references. Appellant

submits that the combination would also not be obvious to one of ordinary skill in the art, since one of such skill would have absolutely no motivation to combine the four references, particularly since Matson teaches away from such a combination.

Significantly, the Examiner herself arrived at the combination of the three references plus Riling et al (who provide spoiling means) used to reject claims 18-20 and 23 only in the second non-final RCE rejection of 01/27/2009, after arguments by the Appellant in the previous non-final RCE rejection of 08/19/2008, made without further claim amendments. Thus, the Examiner has shifted her position from the first to the second non-final rejection, implicitly recognizing that the rejections based on Gordon alone (claims 18-20 and 23) or Gordon plus Riling et al (claims 1-9 and 21-22) were erroneous. This shift indicates that the Examiner did not understand the meaning of "levels", and that she has mistakenly stated in the first non-final rejection that "levels" were taught by Gordon, a position she retracted in the second non-final rejection. Further, this radical change from a rejection of the same claims based on one or two references to a rejection based on the combination of four references shows in Appellant's opinion how non-obvious it would have been to one of ordinary skill in the art to combine these references absent explicit teaching in the references themselves. Note that the Examiner has not explicitly stated at any time in the last two OAs that such teaching actually exists in the references themselves.

In summary, the Appellant submits that system and apparatus recited in claims 1 and 18 provide an article of manufacture with a novel structure representing a fundamental shift in functionality compared to the prior art of record. The unique functionality is clearly expressed in the explicit structural limitations of claims 1 and 18, and particularly in the provision of a "portable kit that includes a plurality of foods with a *predetermined total carbohydrate content*, said foods *spatially organized in levels*, wherein *each level includes foods of substantially similar carbohydrate content* and *wherein said substantially similar carbohydrate content varies from level to level*" (claim 1) and an *asymmetrically shaped kit* that includes a plurality of food storage units; and a plurality of foods having a *known total carbohydrate content* stored in said storage units *by levels according to a carbohydrate content order*, wherein *each level includes foods of substantially similar carbohydrate content* and wherein *said substantially similar carbohydrate content varies from level to level* (claim 18).

Thus, from a careful review of the cited references, it is clear that the references, considered alone or in combination, do not teach or render obvious a system or apparatus comprising the recited elements.

In view of the above arguments, the Appellant believes that the Examiner has failed to show a *prima facie* case for obviousness of claim 1 and 18. Reversal of the § 103(a) rejection of claim 1 is respectfully solicited.

3. Claims 2 and 19

Claims 2 and 19 depend directly from respectively claims 1 and 18, and are believed to be patentable at least for the reasons argued above in the context of claims 1 and 18.

In view of the above argument, the Appellant believes that the Examiner has failed to show a *prima facie* case for obviousness of claims 2 and 19. Reversal of the § 103(a) rejection of claims 2 and 19 is respectfully solicited.

4. Claims 3, 4 and 23

Claims 3 and 4 depend indirectly from claim 1, and are believed to be patentable at least for the reasons argued above in the context of claim 1. Claim 23 depends directly from claim 18 and is believed to be patentable at least for the reasons argued above in the context of claim 18. In addition to those arguments, the Appellant submits that claims 3, 4 and 23 require separate consideration as follows.

Claim 3 recites that the levels vary from a bottom level with N containers of substantially carbohydrate free foods to a top level with M containers of high carbohydrate content foods, and wherein $M < N$. Claim 4 recites that the levels in claim 3 include 3 levels - the bottom level, a middle level and the top level - and that the bottom level includes four containers, the middle level includes three containers, and the top level includes one container. Claim 23 recites that the asymmetric shape of the kit includes a substantially pyramid shape with a wide bottom and a narrow top, that the plurality of foods stored in the storage units according to a carbohydrate content order include carbohydrate-free foods stored in storage units near the bottom and at least one carbohydrate rich food stored in at least one storage unit near the top.

The Examiner has repeatedly stated re. claims 3, 4, 18 and 23 that the shape/configuration of the claimed kit is a matter of choice which the person of

ordinary skill in the art would have found obvious absent persuasive evidence that the particular configuration of the kit is significant. This position is untenable and plain wrong. As repeatedly argued by the Appellant, the configuration of the kit is not a matter of choice but of a definite design: the levels include fewer and fewer foods (containers or compartments) as the food carbohydrate content increases. The different (varied) carbohydrate content of the food in different levels claimed in claims 3, 4, 18 and 23 has a criticality explained by Appellant in detail, see e.g. specification p. 11, lines 7-9 and 12-20:

The configuration of the claimed kit is an essential inventive feature in that the amount of foods (and containers) in each level decreases from foods with low or zero carbohydrate content to foods with high carbohydrate content, when the total carbohydrate content of the kit is predetermined. The configuration allows for easy understanding and remembering of which foods have which carbohydrate content (zero-low, medium or high)

In the Final Rejection dated 06/11/2009, the Examiner states that rearranging/shifting foods in the kit would not have modified the operation of the claimed kit. This is plainly wrong. Rearranging the foods in a kit would certainly modify the operation of the kit: for example, in the arrangement recited in claims 3, 4 and 23, any change between levels will increase the total carbohydrate content of the kit, defeating the purpose of weight loss by providing a total carbohydrate content larger than the predetermined amount. Suppose that the arrangement of the levels in claim 4 is reversed, such as that the bottom level includes four containers with high carbohydrate content foods and the top level includes one container of one substantially carbohydrate free food. The result would be a very high daily carbohydrate content, which would be totally opposite to the object of the system – a successful diet regimen. No prior art structure performs the intended use of the present invention, i.e. a diet regimen based on a defined, limited carbohydrate content, based on foods organized in a kit according to carbohydrate content (see specification, p. 11, lines 10-20). Further and for the same reasons, the Examiner's position that the

particular shape of the kit and arrangement of foods in the kit would have been a matter of personal choice and design preference is also plainly wrong.

In view of the above argument, the Appellant believes that the Examiner has failed to show a prima facie case for obviousness of claims 3, 4 and 23. Reversal of the § 103(a) rejection of claims 3, 4 and 23 is respectfully solicited.

5. Claims 5, 6 and 8

Claims 5, 6 and 8 depend directly or indirectly from claims 1, 3 and 4, and are believed to be patentable at least for the reasons argued above in the context of claims 1, 3 and 4.

In view of the above argument, the Appellant believes that the Examiner has failed to show a prima facie case for obviousness of claims 5, 6 and 8. Reversal of the § 103(a) rejection of claims 5, 6 and 8 is respectfully solicited.

6. Claims 7 and 9

Claims 7 and 9 depend indirectly from claims 1, 3 and 4, and are believed to be patentable at least for the reasons argued above in the context of claims 1, 3 and 4. In addition to those arguments, the Appellant submits that claims 7 and 9 require separate consideration as follows.

Appellant submits that since none of the four references used in the final rejection teaches "levels", *mutatis mutandis*, none of the references teaches color-coded levels (claim 7). Specifically, none of the references teaches red for a top level, yellow for a middle level and green for a bottom level (claim 9). The latter particular choice of colors resembles the red/yellow/green traffic light meanings of stop/ready/go and provides an additional indication helpful with the diet regimen, as specified in the description on page 5, lines 23-28.

In view of the above argument, the Appellant believes that the Examiner has failed to show a prima facie case for obviousness of claims 7 and 9. Reversal of the § 103(a) rejection of claims 7 and 9 is respectfully solicited.

7. Claims 20 and 21

Claims 20 and 21 depend respectively directly and indirectly from claim 18, and are believed to be patentable at least for the reasons argued above in the context of claim 18.

In view of the above argument, the Appellant believes that the Examiner has failed to show a *prima facie* case for obviousness of claims 20 and 21. Reversal of the § 103(a) rejection of claims 20 and 21 is respectfully solicited.

8. Claim 22

Claim 22 depends indirectly from claim 18, and is believed to be patentable at least for the reasons argued above in the context of claim 18.

In view of the above argument, the Appellant believes that the Examiner has failed to show a *prima facie* case for obviousness of claim 22. Reversal of the § 103(a) rejection of claim 22 is respectfully solicited.

B. Closing Comments

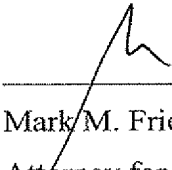
The Appellant believes that the Board of Patent Appeals and Interferences will find, in the prosecution history of this file to-date, various inconsistencies, misuse of term definitions and mistaken interpretation of elements in the prior art by the Examiner. Appellant believes that the Board of Patent Appeals and Interferences will find that the Examiner has failed to show any suggestion or motivation to combine references, either in the references themselves or by one with ordinary skill in the art. Appellant believes that the Board of Patent Appeals and Interferences will find that the Examiner has failed to state a *prima facie* case of obviousness. Appellant further believes that the Board of Patent Appeals and Interferences will find unreasonable the shifting position of the Examiner in rejecting the same set of claims, using the first time only one or two references and the second time four references.

The Appellant believes that the examination, at least with respect to the independent claims, has been sufficiently thorough to establish the patentability of the independent claims, and hence also of the claims depending therefrom. Reopening of prosecution would have the unfair effect of penalizing the Appellant, who would

incur yet further unnecessarily expense and delay due to the errors of the Examiner during prosecution thus far.

For the above reasons, the Board of Patent Appeals and Interferences is respectfully requested to reverse all of the Examiner's grounds of rejection for the claims under consideration and to pass the application to issue.

Respectfully submitted,



Mark M. Friedman
Attorney for Applicant
Registration No. 33,883

Date: September 23, 2009

VIII. CLAIMS APPENDIX

1. (Previously amended) A system for reducing human body weight comprising:
 - a) a portable kit that includes a plurality of foods with a predetermined total carbohydrate content, said foods spatially organized in levels, wherein each level includes foods of substantially similar carbohydrate content and wherein said substantially similar carbohydrate content varies from level to level; and
 - b) spoiling prevention means for keeping said foods from spoiling;whereby the system provides permanent weight loss by limiting a daily carbohydrate intake to said predefined carbohydrate content.
2. (Previously amended) The system of claim 1, wherein each said food is contained in a separate container.
3. (Previously amended) The system of claim 2, wherein said levels vary from a bottom level with N containers of substantially carbohydrate free foods to a top level with M containers of high carbohydrate content foods, and wherein $M < N$.
4. (Previously amended) The system of claim 3, wherein said levels includes three levels, said bottom level, a middle level and said top level, and wherein said bottom level includes four said containers, said middle level includes three said containers, and said top level includes one said container.
5. (Original) The system of claim 4, wherein said spoiling prevention means include cooling packs.
6. (Previously amended) The system of claim 5, wherein said cooling packs are arranged in accordance with said levels to provide cooling to each said container.
7. (Original) The system of claim 6, wherein each said level is color-coded.

8. (Original) The system of claim 7, wherein said color-coding is provided by said cooling packs being colored with a different color for each said level.

9. (Original) The system of claim 7, wherein said color coding include red for said top level, yellow for said middle level and green for said bottom level.

10 -17 (Cancelled)

18. (Previously amended) A portable dieting apparatus comprising:

a) an asymmetrically shaped kit that includes a plurality of food storage units;
and

b) a plurality of foods having a known total carbohydrate content stored in said storage units by levels according to a carbohydrate content order, wherein each level includes foods of substantially similar carbohydrate content and wherein said substantially similar carbohydrate content varies from level to level;

whereby the apparatus provides a predetermined daily carbohydrate intake that leads to permanent weight loss.

19. (Original) The apparatus of claim 18, wherein said storage units are separate containers.

20. (Original) The apparatus of claim 18, wherein said storage units include separate compartments in a one-piece enclosure.

21. (Original) The apparatus of claim 19, further comprising spoiling prevention means to keep said foods from spoiling.

22. (Original) The apparatus of claim 21, further comprising color-coding means for marking said carbohydrate content order.

23. (Original) The apparatus of claim 18, wherein said asymmetric shape includes a substantially pyramid shape with a wide bottom and a narrow top, and wherein said plurality of foods stored in said storage units according to a carbohydrate content

order include carbohydrate-free foods stored in storage units near said bottom and at least one carbohydrate rich food stored in at least one storage unit near said top.

IX. EVIDENCE APPENDIX

NONE

X. RELATED PROCEEDINGS APPENDIX

NONE